No. 77-39

In the Supreme Court of the United States

OCTOBER TERM, 1977

WILLIAM PINKUS D/B/A "ROSSLYN NEWS COMPANY" AND "KAMERA", PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 2a-19a) is reported at 551 F. 2d 1155.

JURISDICTION

The judgment of the court of appeals was entered on April 7, 1977. A petition for rehearing was denied on June 6, 1977 (Pet. App. 1a). The petition for a writ of certiorari was filed on July 6, 1977, and was granted on October 31, 1977 (A. 66). The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether in a federal prosecution for mailing obscene materials and advertisements therefor, the district court's instructions, following the applicable *Roth-Memoirs*[1] standard, properly charged the jury:

(a) not to judge the materials on a personal basis, or "by their effect on a particularly sensitive or insensitive person or group," but rather "by the standard of the hypothetical average person," which is to be determined by considering "the sensitive and the insensitive, in other words * * * everyone in the community"; and

(b) to consider "the community as a whole, young and old, educated and uneducated, the religious and irreligious, men, women and children, from all walks of life."

2. Whether the record contained evidence permitting the district court to instruct the jury that, in determining whether the material appeals to the prurient interest, it should consider the interests of the average person in the community as a whole or of members of a deviant sexual group.

3. Whether the evidence justified the district court's instruction on pandering.

4. Whether the district court properly excluded two films offered by petitioner as comparison evidence to show that the materials involved were not obscene under contemporary community standards in the Central District of California.

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[1] *Roth* v. *United States*, 354 U.S. 476; *Memoirs* v. *Massachusetts*, 383 U.S. 413.

STATEMENT

Petitioner was convicted by a jury in the United States District Court for the Central District of California on 11 counts (A. 3–8) charging that he had mailed obscene materials or advertisements for obscene materials, in violation of 18 U.S.C. 1461. The court of appeals reversed his first conviction because the jury had been charged under the standards set forth in *Miller* v. *California*, 413 U.S. 15, even though the offenses alleged occurred in 1971, when the *Roth-Memoirs* (*Roth* v. *United States*, 354 U.S. 476; *Memoirs* v. *Massachusetts*, 383 U.S. 413) standard applied. See *Marks* v. *United States*, 430 U.S. 188. The case was therefore remanded for a new trial under *Roth-Memoirs*. *United States* v. *Pinkus*, C.A. 9, No. 73–2900, decided April 1, 1975. In 1976, after a jury trial under the *Roth-Memoirs* standard, petitioner again was convicted on all 11 counts. He was sentenced to concurrent terms of four years' imprisonment and was fined $500 on each count, for a cumulative total fine of $5,500.[2] The court of appeals affirmed (Pet. App. 2a-19a).

A. THE EVIDENCE

1. The government's case in chief consisted of the mailed materials, exhibits and a stipulation of facts (A. 13–18; Tr. 134–141). Petitioner stipulated that

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[2] After petitioner's second conviction he was initially fined $1,000 on each count, but in June 1976 the district court reduced the fine to $500 per count so as not to exceed the amount that petitioner had been fined after his conviction at his first trial.

he had "voluntarily and intentionally" used the mails on 11 occasions to deliver "illustrated brochure[s] advertising sex films, books and magazines" as well as a film, "613," and "Bedplay" magazine, with the intention that these materials be for the "personal use of the recipient[s]" (*ibid.*). The recipients of this material, by implication in the stipulation, were adults (A. 12; Tr. 59, 61) who resided in various cities and states across the country (*ibid.*).

Each of the eleven exhibits consisted of an outside envelope addressed to the recipient, stamped from Pitney Bowes postage meter No. 621316, and printed with the return address of Kamera's office (G. Exs. 1–11). Each outer envelope also contained a preaddressed return envelope for use in ordering the advertised materials (G. Exs. 1A, 2B, 3B, 4B, 5B, 6B, 7H, 8B, 9G, 10B, 11D).

In addition, each mailing included at least one four page black and white illustrated brochure advertising films, books and magazines relating entirely to sex.[3] The brochure in four of the mailings included an advertisement for "Bedplay" magazine, and several other magazines, consisting of a photograph of the cover of the magazine next to a photograph focusing

[3] In one mailing (G. Ex. 11C) petitioner also included a green sheet of paper which indicated that he "acquired [the recipient's] name by buying out another mail order house," and requested that the recipient "check the proper box indicating the type of merchandise [he is] most interested in receiving from us," as follows:

"[] Novelties (Rubber Goods)
"[] Fetish (a serious study of Corporal Punishment, etc.)
"[] Gay (Paperbacks, Films, Magazines, Picture Sets)
"[] Hetero (Magazines, Books, Films)."

on the genitals of a man and woman engaged in sexual intercourse. The cover of "Bedplay" itself portrayed the faces of two women lying on either side of an erect penis; seminal fluid is clearly visible on the cheek of one of the women. Another page of the brochure is devoted to photographs displaying explicit sexual conduct and advertising for sale films dealing with lesbianism, sex with artificial devices, group sex, fellatio and cunnilingus.[4] The third page, entitled "Male Order," is devoted to materials aimed at homosexuals, has pictures of oral and anal intercourse and advertises a magazine "Young and Ready." The final page of the magazine advertises "bondage" magazines and has a clip out order form to be used in ordering any of the materials advertised in the brochure. The brochures involved in each count contain a similar order form (G. Exs. 1B, 2A, 3A, 7B).

"Bedplay" magazine itself was one of the mailed objects involved in Count 7 (see, *e.g.*, G. Ex. 7A). It is a thirty-two page magazine which sells for $10 and contains color photographs on each page with little or no written material.[5] The photographs focus on

[4] A caption for the film "Mustachioed Magic" is illustrative. It states: "No Mr. America, but equal in stamina and stamen. His honey blond sex partner really stirs him up in the process and we are sure you will be too."

[5] A few of the captions for the pictures state: "We counted and no less than thirty-five shots from the silver screen, and all came from the old flasheroo. * * * It's a good point that beauty is what sells even unto the realm of porno films. There's nothing more profitable than a pretty girl, be she clothed and retouched in a slick men's magazine or getting some shot up her nostrils in a stag film."

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the genitals of persons engaged in fellatio, cunnilingus, masturbation, anal intercourse and group sex.

Brochures advertising the film "613" were included in two mailings (G. Exs. 8A and 9B). These brochures resembled those previously described but also contained an advertisement for a magazine "Female Pedophilia—A Study of Boys as Sex Partners." The advertisement for "613" was a photograph of group fellatio.

Film "613" itself was included in one of the mailings (G. Ex. 9A). It is a single reel of 8mm. black and white film with no sound track. It involves two men and two women who engage in normal intercourse, anal intercourse, fellatio, cunnilingus and masturbation. The film focuses on the genitals, contains no plot and ends with one man ejaculating onto the hand of a woman who is masturbating him.

The remaining counts involve brochures similar to those advertising "613" and "Bedplay." All devote one page to homosexual materials and one page to bondage, masochism and female domination (see, *e.g.*, G. Exs. 4A, 5A, 6A, 7C, 9D, 9E, 10A, 11A). Some of the brochures also advertise bestiality (see, *e.g.*, G. Exs. 4A, 5A, 6A, 7E, 9E), coercive sex (G. Exs. 7C, 9D), a film entitled "Dirty Old Man" with a photograph of a young teenage girl performing fellatio (G. Ex. 11A), harnesses (G. Ex. 11B), artificial devices (G. Exs. 7G, 11B), and playing cards (G. Exs. 7D, 10A).

2. Petitioner presented several witnesses who testified concerning community standards and the appeal of the materials to the prurient interest of the aver-

age person. Dr. Michael Ward and Reverend Robert Theodore McIlvenna from the National Sex Forum testified about the appeal of petitioner's materials to the prurient interest (Tr. 304–307, 469). Both stated that the average person would find these materials arousing and informational and view them with interest and curiosity. In their opinion, however, the materials did not appeal to a prurient interest in sex (Tr. 368–370, 478). They observed further that even the depictions of bestiality would be viewed as informative by the average person (Tr. 374–375). They stated that the only types of photographs that might appeal to a prurient interest in sex were those relating to necrophilia or sadomasochism (Tr. 500–502). Dr. Ward also testified that he sent people with sexual problems to adult bookstores and movie theaters, "[b]ecause the viewing of the materials in certain situations has tremendous value, a therapeutic value" (Tr. 379).

Both Dr. Ward and Reverend McIlvenna based their conclusion that sexually explicit materials do not appeal to the prurient interest on a survey of the reactions of people who voluntarily attended courses in human sexuality at the National Sex Forum. This survey was taken after the volunteers had viewed films and pictures portraying explicit sexual conduct (Tr. 342). The district court refused to admit the results of that survey into evidence because the people who attended the National Sex Forum came from the entire United States rather than the Central District of California and because the survey sampled only

persons who voluntarily attended the Forum, knowing that they would view sexually explicit materials (Tr. 352–360, 402).

The district court admitted into evidence, however, a more localized survey offered by the defense. Two witnesses, Dr. Roderick Bell and Gayle Essary, employees of a public opinion research firm, presented the results of a survey they had conducted in 1973 in Los Angeles, Orange County and San Bernardino regarding obscenity (Tr. 176–181, 218–219, 226, 268, 271). The survey was conducted primarily in urban areas and did not include all of the Central District (Tr. 242–243). The questions in the survey attempted to discern the degree of public acceptance of explicit sex in films and books available in adult movie theaters and book stores (Tr. 519–535; Def. Exs. G, H, I).

Petitioner also sought to introduce two films, "Deep Throat" and "The Devil in Miss Jones," as comparison evidence (A. 19; Tr. 170). The defense stated that they had been commercially successful in the Los Angeles area and were "just as candid as the material in this case" (A. 20; Tr. 171). Therefore, it was argued, the films were relevant to the jury's determination of community standards. After viewing a portion of "Deep Throat," the court refused to admit either film (A. 20–21, 41–42; Tr. 171–172, 627–628, 693). The court permitted petitioner, however, to introduce evidence that they had been, respectively, the first and third largest money-makers among all

movies shown in Los Angeles in 1973 (A. 21–27; Tr. 283–306).

3. In rebuttal, the government presented Dr. James J. Rue, a licensed marriage, family and child counsellor (Tr. 546–547). He testified that the brochures mailed by petitioner in this case depicted oral sex, group sex, homosexuality, sex with animals, artificial devices, anal sex, masturbatory sex and sadomasochism or sadobondage (A. 33; Tr. 572–573). Dr. Rue stated that he had studied deviant sexual groups and was of the opinion that these materials appealed "to the prurient interest of the average person in the community as well as deviate [sic] particular groups" (A. 33–35, 41; Tr. 571–574, 588–589). Dr. Rue further testified that the publication "Female Pedophilia" and the film "Dirty Old Man" would appeal "to a deviate [sic] group that might be described as a sociopathic type of person" (A. 39–40; Tr. 580–581).[6]

B. THE DISTRICT COURT'S INSTRUCTIONS

The trial court instructed the jury that to satisfy the *Roth-Memoirs* standard for obscenity, it had to find that the materials considered as a whole appealed to the prurient interest in sex, were patently offensive and were utterly without redeeming social value (A.

[6] When asked what the effect of viewing matter similar to the materials in this case would be on the viewer, Dr. Rue also testified that it could have a "deleterious effect upon the marital relationship, or in the minds of the young person who may be contemplating marriage" (A. 37–39; Tr. 578–580).

55; Tr. 804). In determining appeal to the prurient interest the jury was told to use a community rather than a national standard. The court then stated (A. 56–58; Tr. 806–808):

> The first test to be applied, in determining whether a given picture is obscene, is whether the predominant theme or purpose of the picture, when viewed as a whole and not part by part, and when considered in relation to the intended and probable recipients, is an appeal to the prurient interest of the average person of the community as a whole or the prurient interest of members of a deviant sexual group at the time of mailing.
>
> * * * * *
>
> In applying this test, the question involved is not how the picture now impresses the individual juror, but rather, considering the intended and probable recipients, how the picture would have impressed the average person, or a member of a deviant sexual group at the time they received the picture.
>
> Thus the brochures, magazines and film are not to be judged on the basis of your personal opinion. Nor are they to be judged by their effect on a particularly sensitive or insensitive person or group in the community. You are to judge these materials by the standard of the hypothetical average person in the community, but in determining this average standard you must include the sensitive and the insensitive, in other words, you must include everyone in the community.
>
> * * * * *

> In determining community standards, you are to consider the community as a whole, young and old, educated and uneducated, the religious and the irreligious, men, women and children, from all walks of life.

Petitioner objected to the inclusion of "children" and "sensitive" people in determining "the community as a whole" and to the instruction that materials may be obscene because of their appeal to the prurient interests of deviant sexual groups. Each of these objections was overruled (Tr. 630–631, 639–643, 654, 659, 664–669).

Petitioner also objected to a pandering charge (Tr. 644–651). The district court "reviewed all of the exhibits" and "in the light of [their] appeal * * * and the totality of the evidence in this case" (Tr. 735) gave the following instruction on pandering (A. 59–60; Tr. 810–811):

> Having covered the three elements of obscenity, there is one additional matter that you may consider, and that is the matter of pandering. You must make the decision whether the materials are obscene under the test I have given you. In making this determination you are not limited to the materials themselves. In addition, you may consider the setting in which they are presented. Examples of what you may consider in this regard are such things as: manner of distribution, circumstances of production, sale and advertising. The editorial intent is also relevant. What you are determining here is whether the materials were produced and sold as stock in trade of the business of pandering. Pan-

dering is the business of purveying textual or graphic matter openly advertised to appeal to erotic interest of the customer.

The question of obscenity is to be answered by application of the basic test recited earlier, but if you find this to be a close case under that test, then you may consider the evidence of pandering to assist you in your decision. Such evidence is pertinent to all three elements of the basic test of obscenity.

The circumstances of presentation and dissemination of material are especially relevant to a determination of whether the social importance claimed for the material is pretense or reality, or whether it was the basis upon which it was traded in the marketplace or a spurious claim for litigation purposes. Where the distributors' sole interest is on the sexually provocative aspects of the publications, that fact may be decisive in the determination of obscenity.

In summary, evidence of pandering simply is useful in applying the basic obscenity test where an exploitation of interest in titillation by pornography is shown with respect to the material lending itself to such exploitation through pervasive treatment or description of sexual matters. Such evidence may support the determination that the material is obscene, even though, in other context, the material would escape such condemnation.[7]

C. THE OPINION OF THE COURT OF APPEALS

The court of appeals upheld the instructions.

[7] During its deliberations, the jury requested that the pandering charge be reread and the trial judge did so (A. 63–65; Tr. 822–824).

The court ruled that "[t]he judge's reference here to the sensitive and the insensitive was merely an elaboration on the concept of the total community" (Pet. App. 5a). With respect to the reference to children in the definition of community, the court held the instruction "did not, as [petitioner] contends, result in reducing the adult population of the Central Judicial District of California to reading what is fit only for children. *Compare Butler* v. *Michigan,* 352 U.S. 380 (1957). The *entire community* was explicitly made the appropriate standard for consideration" (Pet. App. 6a; emphasis by court).[8]

The court held that, in the light of the materials themselves and the testimony of the government's rebuttal witness, there was sufficient evidence "to establish that the material was designed and disseminated to a deviant group" (Pet. App. 7a). Moreover, the court held, under the rationale of *Hamling* v. *United States,* 418 U.S. 87, 128, that the jury might conclude that some of the materials in this case could be found to have a prurient appeal to a deviant sexual group (Pet. App. 7a–8a).

[8] The court also stated (Pet. App. 5a–6a) that "the specific inclusion of children is unnecessary in the definition of the community and [that it] prefer[s] that children be excluded from the court's instruction until the Supreme Court clearly indicates that inclusion is proper." Comparing the approval of a similar charge in *Roth* v. *United States*, *supra*, with the caveat in *Ginzburg* v. *United States*, 383 U.S. 463, 465, n. 3, and noting that "community" has not been defined by this Court except geographically, the court concluded that "[t]he error, if any, does not require reversal" (Pet. App. 6a).

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The court also concluded from its review of the exhibits and the stipulation in this case that, except for the mailing location, all of the elements that established pandering in *Ginzburg* v. *United States*, 383 U.S. 463, 470–476, were present here.

The court viewed the two allegedly comparable films. It held that to be admissible as comparison evidence they had to bear a reasonable resemblance to the allegedly obscene materials and had to be supported by evidence that such material enjoys a reasonable community acceptance. It concluded that the films bore a reasonable resemblance, and hence were relevant, only to petitioner's film "613." It declined to determine, however, whether petitioner had shown sufficient community acceptance of the two films to warrant their admission, on the ground that reversal would not affect petitioner's concurrent sentence (Pet. App. 12a–14a).

SUMMARY OF ARGUMENT

I

The trial court properly instructed the jury to consider "the sensitive and the insensitive" in "the community as a whole," as well as "men, women and children, from all walks of life." When these references are viewed, as they must be, in the context of the charge as a whole, they are simply applications of the well-established principle that obscenity *vel non* depends on the average conscience of the entire community. That standard is designed to assure that

jurors will apply an objective standard that focuses neither on the most susceptible nor the most callous elements in the community as a whole. The mention of sensitive persons and children in the district court's charge closely followed the language of the charge this Court approved in *Roth* v. *United States*, 354 U.S. 476, 490. We agree with the court of appeals that the better practice for trial judges is not to refer to children at all, in order to avoid any possibility that less carefully framed instructions might cause the jury to give undue weight to the impact of sexually-oriented materials on this group. In this case, however, the court of appeals correctly held that the instructions as a whole eliminated any risk that this might happen.

II

The record contained evidence permitting the trial court to instruct the jury that it could find the material obscene if it appealed to the prurient interest in sex of members of a deviant group. Under *Mishkin* v. *New York*, 383 U.S. 502, 508, the prurient-appeal requirement of the *Roth* test is satisfied if the dominant theme of the material taken as a whole appeals to the prurient interest of a clearly defined deviant sexual group. The materials here included portions aimed at persons interested in homosexual or sado-masochistic materials. These materials were themselves the best evidence of what petitioner was offering, and to whom. Moreover, the government presented expert testimony to rebut petitioner's presentation on this issue.

III

The evidence justified the instruction on pandering. The advertising materials here were designed to appeal to the erotic interests of the customer. Petitioner's brochures graphically and textually disclose no other purpose, and petitioner claims none. Additional evidence going to petitioner's editorial goals, practices, methods of operations and distribution was not required, because such evidence bears on weight and persuasiveness, not the threshold requirement for a pandering instruction under *Ginzburg* v. *United States,* 383 U.S. 463, 467, which the materials here satisfied.

IV

The district court properly exercised its discretion in excluding the films "Deep Throat" and "The Devil in Miss Jones" as comparison evidence. The concurrent sentence doctrine, invoked by the court of appeals to limit its consideration of this issue, is inapplicable here because petitioner was sentenced to separate fines on each of the eleven counts on which he was convicted. Nevertheless, the record shows that the two films do not meet the prerequisites for comparison evidence: (1) that they bear a reasonable resemblance to the allegedly obscene materials; and (2) that the evidence shows a reasonable degree of community acceptance of the proffered comparison evidence.

The two films were not comparable to the advertising materials because they were in a totally different

medium and format and did not have homosexual or sadomasochistic content. They were also completely different from petitioner's film "613." The comparison films were feature-length color films with music, dialogue, a plot, purported humor and structured cinematic direction, and they were designed for showing in a commercial theater. "613" is a black and white 8 mm. film of poor quality with no soundtrack, dialogue, subtitles, or plot, edited to emphasize only the sexual episodes.

Moreover, the evidence did not show significant community acceptance of the two films in the Central District of California or demonstrate that the average person in that community would not find the films obscene. Petitioner showed only that the films had enjoyed substantial commercial success. He did not account for the views of the large number of adults in the seven counties of the district who did not attend the film, or for the likelihood that many ticket-buyers in Los Angeles were tourists, conventioneers, or repeat viewers. Successful showings of films like "Deep Throat," and "The Devil in Miss Jones," which have been found obscene elsewhere, prove only that there is a market for pornography, not that it is acceptable in the Central District of California as a whole. Introduction of those films would have invited the jury to speculate on the obscenity *vel non* of the comparison films themselves, thereby tending to confuse the issues, and would have made the trial unnecessarily complex. Petitioner had ample opportunity to and did

present other evidence relating to local community standards; the jury, which is the arbiter on this issue, was not persuaded by this evidence.

ARGUMENT

I. THE DISTRICT COURT PROPERLY INSTRUCTED THE JURY TO CONSIDER "THE SENSITIVE AND THE INSENSITIVE" IN "THE COMMUNITY AS A WHOLE," AS WELL AS "MEN, WOMEN AND CHILDREN, FROM ALL WALKS OF LIFE"

Petitioner's first conviction was vacated and remanded for retrial under the *Roth-Memoirs* standard (*Roth* v. *United States,* 354 U.S. 476; *Memoirs* v. *Massachusetts,* 383 U.S. 413). The trial judge instructed the jury in terms that this Court had expressly approved in *Roth.* 354 U.S. at 489–490. Petitioner contends that in doing so, the trial judge committed reversible error (Pet. Br. 14–21). The court of appeals correctly rejected that contention.

It is familiar doctrine that "a single instruction to a jury may not be judged in artificial isolation, but must be viewed in the context of the overall charge." *Cupp* v. *Naughten,* 414 U.S. 141, 146–147. This is so because "'[o]ften isolated statements taken from the charge, seemingly prejudicial on their face, are not so when considered in the context of the entire record of the *trial.*'" *United States* v. *Park,* 421 U.S. 658, 674–675 (emphasis in the original), quoting from *United States* v. *Birnbaum,* 373 F. 2d 250, 257 (C.A. 2), certiorari denied, 389 U.S. 837. These principles are fully applicable to instructions in obscenity cases. *Hamling* v. *United States,* 418 U.S. 87, 107–108.

Equally settled is the rule that the obscenity *vel non* of particular materials must be determined by their "impact upon the average person in the community." *E.g., Roth* v. *United States,* 354 U.S. 476, 490; *Hamling* v. *United States,* 418 U.S. 87, 107; *Smith* v. *United States,* 431 U.S. 291, 304. While "expressions in opinions [of this Court] vacillated somewhat before coming to the position that a national community standard was not constitutionally mandated" (*Smith* v. *United States, supra,* 431 U.S. at 300, n. 6),[9] the concept of "the community as a whole" as the guiding principle has remained constant whatever the geographic limits of the relevant community. "[This] Court has never varied from the *Roth* position" that the average conscience of the "entire community" is the touchstone for obscenity, and not the conscience of "a small, atypical segment of the community." *Smith* v. *United States, supra,* 431 U.S. at 300 n. 6, 305. Thus, in determining obscenity ju-

[9] Although *Roth* v. *United States, supra,* did not define the geographic boundaries of communities' standards, the Court applied a national standard in the cases subsequent to *Roth.* See *Jacobellis* v. *Ohio,* 378 U.S. 184, 195; *Manual Enterprises* v. *Day,* 370 U.S. 478, 488. The national standard was abandoned and a local community standard was adopted in *Miller* v. *California,* 413 U.S. 15, 30–39. One Term later in *Hamling* v. *United States,* 418 U.S. 87, 107, this Court held that an instruction employing a national standard "does not render [the] convictions void as a matter of constitutional law * * *" because such an instruction accomplished the purpose of assuring "* * * that the material is judged neither on the basis of each juror's personal opinion, nor by its effect on a particularly sensitive or insensitive person or group." In the present cases petitioner was tried under a local community standard, the community being the Central District of California.

rors must "consider the entire community and not simply their own subjective reactions, or the reactions of a sensitive or of a callous minority." 431 U.S. at 301; *Hamling* v. *United States,* 418 U.S. 87, 107.

The reason for the continuing vitality of this concept is evident. As Judge Learned Hand pointed out, the laws regulating obscenity essentially reflect a "compromise between candor and shame at which the community may have arrived here and now." *United States* v. *Kennerley,* 209 Fed. 119, 121 (S.D. N.Y.); see *Jacobellis* v. *Ohio,* 378 U.S. 184, 192 (opinion of Mr. Justice Brennan). Thus, the legal standard for obscenity must necessarily mirror the "average conscience of the time." *United States* v. *Kennerley, supra,* 209 Fed. at 121. To assure that community standards are being applied, jurors must be warned not to analyze the material in terms of their personal, subjective opinions or values. See *Hamling* v. *United States, supra,* 418 U.S. at 107; *United States* v. *Cutting,* 538 F. 2d 835, 841 (C.A. 9), certiorari denied, 429 U.S. 1052.[10]

"[A] juror sitting in [an] obscenity case" must draw on the "knowledge of the community or vicinage

[10] If the jury is instructed to determine obscenity "by the effect of isolated passages upon the most susceptible persons" (*Roth* v. *United States, supra,* 354 U.S. at 489), then its determination is flawed because the jury must base its decision in light of the "community as a whole." *Roth* v. *United States, supra,* 354 U.S. at 490. "[T]he recipient group [must] be defined with more specificity than in terms of sexually immature persons, [and] also avoids * * * the inadequacy of the most-susceptible-person facet of the [*Regina* v.] *Hicklin* [[1868] L.R. 3 Q. B. 360] test." *Hamling* v. *United States,* 418 U.S. 87, 129, quoting from *Mishkin* v. *New York,* 383 U.S. 502, 508–509.

from which he comes in deciding what conclusion 'the average person, applying contemporary community standards' would reach in a given case." *Hamling* v. *United States, supra,* 418 U.S. at 105. The "average person" has been likened to the "reasonable" man used to measure standards of permissible conduct in other areas of law. *Id.* at 104–105; *Smith* v. *United States, supra,* 431 U.S. at 302.

We now show that under these principles the references in the trial judge's instructions to "the sensitive and the insensitive" and to "men, women and children" were proper, when viewed in light of both the "overall charge" (*Cupp* v. *Naughten, supra*) and the "entire record of the trial" (*United States* v. *Park, supra*).

A. SENSITIVE PERSONS

The district court first generally explained to the jury the three elements of the *Roth-Memoirs* test (A. 55–56; Tr. 804–806).[11] It then explained each ele-

[11] The court stated (*ibid.*): "'Obscene' means something which deals with sex in a manner such that the predominant appeal is to prurient interest; which, when considered as a whole, and not part by part, appeals to prurient interest in a way or manner substantially beyond the acceptable limits of candor in dealing with matters relating to sex, as established at the time of its dissemination by the current standards of the community as a whole, and which is utterly lacking in redeeming social value or importance.

* * * * *

"With regard to the three essential elements just mentioned, you are hereby instructed that in order to find the materials involved in the within case legally obscene the materials must be found to violate all three of the stated elements. Thus, if you should find, for example, that the materials did appeal to the prurient interest

ment in detail. In discussing the first element, "appeal to the prurient interest of the average person of the community as a whole" (A. 57; Tr. 807), it emphasized (*ibid.*):

> Thus the brochures, magazines and film are not to be judged on the basis of your personal opinion. Nor are they to be judged by their effect on a particularly sensitive or insensitive person or group in the community. You are to judge these materials by the standard of the hypothetical average person in the community, but in determining this average standard you must *include the sensitive and the insensitive, in other words, you must include everyone in the community.* [Emphasis added.]

This instruction did not direct the jury to focus on the most susceptible or on the most callous. As the court of appeals noted, it "was merely an elaboration on the concept of the total community. The trial judge specifically said * * * that the materials were *not* to be judged by their effect on a particularly sensitive person" (Pet. App. 5a; emphasis by court). In *Roth,* the trial court had charged, in language that this Court approved (354 U.S. at 490):

> The test is not whether it would arouse sexual desires or sexual impure thoughts in those

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and did violate contemporary community standards but was not 'utterly without redeeming social importance' you must acquit. Likewise if, for example, the materials did violate contemporary community standards and was 'utterly without redeeming social importance' but did not appeal to the prurient interest, you must acquit. The point is the materials must violate all three of the stated three essential elements in order for you to find that it is legally obscene."

> comprising a particular segment of the community, the young, the immature or the highly prudish or would leave another segment, the scientific or highly educated or the so-called worldly-wise and sophisticated indifferent and unmoved * * *.

The district court's charge in the instant case fairly restated the substance of that instruction from *Roth* (A. 57; Tr. 807).

Petitioner nevertheless contends (Br. 22) that the instruction is defective because it requires "the jury to *include* the sensibilities of *'everyone'* in the community in its deliberations before calculating the average level of sensitivity." He argues that jurors cannot know everyone in the community and cannot "intelligently * * * apply an equation which requires them to arrive at the median" (*ibid.*).

This argument misconceives the jury's function. It is not computing "some abstract formulation" (*Miller* v. *California,* 413 U.S. 15, 30) or resolving a statistical equation to determine a mathematical average. Its function is to "take account of all the components that comprise the community as a whole." *United States* v. *Treatman,* 524 F. 2d 320, 323 (C.A. 8).

In sum, "contemporary community standards must be applied by juries in accordance with their own understanding of the tolerance of the average person in [the] community * * *." *Smith* v. *United States, supra,* 431 U.S. at 305. The district court's charge correctly emphasized that this understanding must be objective and inclusive of the community as a whole.

In emphasizing to the jury the importance of the community as a whole, the trial court also said (A. 58; Tr. 808):

> In determining community standards, you are to consider the community as a whole, young and old, educated and uneducated, the religious and the irreligious, men, women and children, from all walks of life.

Like the reference to "the sensitive and insensitive," this single sentence from the instruction was part of the court's emphasis on an objective test of average community attitudes.

It closely followed the charge in *Roth* (354 U.S. at 490):

> In this case, ladies and gentlemen of the jury, you and you alone are the exclusive judges of what the common conscience of the community is, and in determining that conscience you are to consider the community as a *whole, young and old, educated and uneducated, the religious and the irreligious—men, women and children.* [Emphasis added.]

This Court stated in *Roth* that the trial court had "followed the proper standard" and had "used the proper definition of obscenity" in its instructions. *Id.* at 489.

Petitioner contends (Br. 20) that any reference to children is necessarily an invitation to the jury to look to the most susceptible members of the community in determining applicable standards. As the Court's approval of the instruction in *Roth* indicates, however, that is not so if the instructions as a whole make it clear that the jury must not assess material by its effect on the most susceptible.[12]

The charge here did so. It expressly warned the jurors not to judge the materials by their effect on the particularly sensitive (or insensitive) (A. 57; Tr. 807). It stated some nine times that the community as a whole and the reaction of the average person is the proper standard (A. 57–59; Tr. 806–809).

Petitioner contends (Br. 18–19) that the court did not approve this part of the charge in *Roth* because it subsequently made the following statement in *Ginzburg* v. *United States,* 383 U.S. 463, 465, n. 3:

> We are not, however, to be understood as approving all aspects of the trial judge's exegesis of *Roth,* for example his remarks that "the community as a whole is the proper consideration. In this community, our society, we have children of all ages, psychotics, feeble-minded and other susceptible elements. Just as they cannot set the pace for the average adult reader's taste, they cannot be overlooked as part of the community." 224 F. Supp. [129, 137 (E.D. Pa.)]. Compare *Butler* v. *Michigan,* 352 U.S. 380.

[12] The *Roth* instruction elaborated on the point that neither the sensitive nor the insensitive are the barometer for determining obscenity by emphasizing that the standard is that of the "average person" in the "community as a whole." 354 U.S. at 490. To further illustrate "the community as a whole," the charge listed a series of opposites for the jury, including "the religious and the irreligious," so that the jury would not select its "average person" from a distorted, subjective view of society. The instructions here followed the same approach (A. 58–60; Tr. 808–810).

As its words make clear, the Court was not questioning the continued vitality of the *Roth* charge, but rather the *Ginzburg* trial court's "exegesis" of that charge.[13] The trial court's opinion in *Ginzburg* emphasized that children, psychotics, the feeble minded and other susceptible elements were part of the community. In so emphasizing the most "susceptible" elements, the opinion lacked the balance and neutrality of the *Roth* standard, which properly gave equal emphasis to contrasting elements of society's spectrum in defining "the community as a whole."

Subsequent to *Ginzburg*, the *Roth* charge, in substantially the same form given in this case, was upheld. *United States* v. *Manarite*, 448 F. 2d 583 (C.A. 2), certiorari denied, 404 U.S. 947. As the court said (448 F. 2d at 592):

> It makes it clear that the community as a whole is to be considered in determining what its standards are. It does not put any undue emphasis on the fact that children are part of this community.

The mention of children in the charge here is not inconsistent with *Butler* v *Michigan*, 352 U.S. 380. That case involved the validity of a Michigan statute condemning the distribution to anyone of books tend-

[13] The United States Court of Appeals for the Second Circuit misinterpreted the *Ginzburg* footnote in *United States* v. *Manarite*, 448 F. 2d 583, certiorari denied, 404 U.S. 947. *Manarite* attributed the language in the opinion of the district court in *Ginzburg* to the *Roth* case, and thereby construed the *Ginzburg* footnote as questioning the correctness of the *Roth* definition of community standards. However, the *Ginzburg* footnote, properly read, does not question the *Roth* charge.

ing to corrupt the morals of minors, a law that thus "reduce[d] the adult population of Michigan to reading only what is fit for children" (*id.* at 383–384). The charge in this case, however, did not instruct the jury to apply such a standard. On the contrary, it explicitly emphasized the standards of the average person in the community as a whole.

Although the court of appeals found no reversible error in the trial court's reliance on the *Roth* instruction, it stated that "inclusion of children is unnecessary in the definition of the community" and that children should be excluded from future instructions until this Court determines otherwise (Pet. App. 5a–6a). In this case, however, the instructions as a whole eliminated any possibility that the jury might give undue weight to the impact of the material upon children. Although the better practice is for trial judges not to refer to children at all in defining the community, to avoid the possibility that less carefully framed instructions may mislead the jury (cf. *Ginzburg* v. *United States, supra*, 383 U.S. at 465, n. 3), the instructions here, taken as a whole, avoided that danger and were correct.

II. THE RECORD CONTAINED EVIDENCE PERMITTING THE DISTRICT COURT TO INSTRUCT THE JURY THAT IT COULD FIND THE MATERIAL OBSCENE IF IT APPEALED TO THE PRURIENT INTEREST IN SEX OF MEMBERS OF A DEVIANT SEXUAL GROUP

The district court charged that the jury should consider (A. 56–57; Tr. 806):

> [W]hether the predominant theme or purpose * * * is an appeal to the prurient interest of

> the average person of the community as a whole or the prurient interest of members of a deviant sexual group at the time of the mailing.

Petitioner contends (Br. 39–45) that the government's proof did not justify a "deviant group" instruction. This contention is unsound.

In cases since *Roth,* the Court has "regarded the materials as sufficient in themselves for the determination of the question" of obscenity. *Paris Adult Theatre I* v. *Slaton,* 413 U.S. 49, 56, quoting from *Ginzburg* v. *United States,* 383 U.S. 463, 465. See also *Jenkins* v. *Georgia,* 418 U.S. 153, 159–160; *Hamling* v. *United States, supra,* 418 U.S. at 100; *Kaplan* v. *California,* 413 U.S. 115, 120–121. It is also settled that "[a] juror is entitled to draw on his own knowledge of the views of the average person in the community or vicinage from which he comes for making the required determination * * *." *Hamling* v. *United States, supra,* 418 U.S. at 104. Materials that are directed at the prurient interest of members of deviant sexual groups, however, are assumed to have little or no appeal to the average or normal person.

The Court dealt with such materials in *Mishkin* v. *New York,* 383 U.S. 502, 505,[14] That case involved fifty books which "* * * portray[ed] sexuality in

[14] The Court first considered deviant pornography in *Manual Enterprises* v. *Day,* 370 U.S. 478. The materials there were "composed primarily * * * for homosexuals" and "* * * would appeal to the 'prurient interest' of such sexual deviates, but would not have any interest for sexually normal individuals * * *." The Court had granted review to define "the relevant 'audience' in terms of which * * * 'prurient interest' appeal should be judged." 370 U.S. at 481–482 (opinion of Mr. Justice Harlan). The court of appeals

many guises. Some depict[ed] relatively normal heterosexual relations, but more depict[ed] such deviations as sado-masochism, fetishism, and homosexuality." Mishkin argued that these books did not "satisfy the prurient-appeal requirement because they [did] not appeal to a prurient interest of the 'average person' in sex, that 'instead of stimulating the erotic, they disgust and sicken.' " *Id.* at 508. The Court "reject[ed] this argument as being founded on an unrealistic interpretation of the prurient-appeal requirement," and held (*ibid.*):

> Where the material is designed for and primarily disseminated to a clearly defined deviant sexual group, rather than the public at large, the prurient-appeal requirement of the *Roth* test is satisfied if the dominant theme of the material taken as a whole appeals to the prurient interest in sex of the members of that group.

Mishkin thus "adjusted the prurient appeal requirement to social realities" (383 U.S. at 508–509); materials could be obscene if they appealed to the prurient interest of the "average person" in the community or, alternatively, to members of a "clearly defined deviant sexual group." See *Smith* v. *United States, supra,* 431 U.S. at 300 n. 6.

in *Manual Enterprises* had refused to apply the *Roth* "average person" test to materials that catered to homosexuals and instead "held that the administrative finding respecting their impact on the 'average homosexual' sufficed to establish the Government's case as to their obscenity." *Ibid.* After examining the materials, this Court found that they were not obscene for the different reason that they were not patently offensive. Accordingly, the Court did not reach the relevant audience question.

The Court further clarified this relevant audience standard in *Hamling* v. *United States, supra,* 418 U.S. at 127–130. There a government expert witness testified that the brochure in question "appealed to the prurient interest of various deviant sexual groups" (*id.* at 127).[15] The Court held that such evidence was admissible under *Mishkin, supra,* since "each of the pictures said to appeal to deviant groups did in fact appear in the brochure * * * [and] it was 'manifest that the District Court considered that some of the portrayals in the Brochure might be found to have a prurient appeal' to a deviant group. 481 F. 2d [307,] 321 [C.A. 9]." *Hamling* v. *United States, supra,* 418 U.S. at 128–129.

Under these criteria, there was ample evidence to support a "deviant group" instruction. The third page of each four page brochure was devoted to publications concerning male homosexual sex. That page generally was entitled "Male Or[illegible]" or "Male Bag," making clear the deviant group [illegible]hich it was aimed (see, *e.g.,* G. Exs. 1B, 4A, 8A). Similarly, page four of each brochure advertised bondage and other sado-masochistic materials.[16]

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[15] Specifically, he testified that the materials appealed to "homosexuals, group sexual activists and persons in masochism, pedophilia and zoophilia." *United States* v. *Hamling*, 481 F. 2d 307, 321 (C.A. 9).

[16] In *Ward* v. *Illinois*, 431 U.S. 767, 773, this Court held that sadomasochistic materials may be constitutionally proscribed although not "expressly included within the examples of the kinds of sexually explicit representations" that *Miller* v. *California*, 413 U.S. 15, 24, listed as patently offensive.

Besides their blatant appeal to such deviant sexuality, the brochures also advertised materials on bestiality (G. Exs. 4A, 5A, 6A, 7E, 9E), pedophilia (G. Exs. 8A, 9B), lesbianism (G. Exs. 1B, 2A, 3A, 7B), device sex (G. Exs. 7G, 11B) and group sex (G. Exs. 1B, 7A, 8A, 9B). Most of the brochures integrated advertisements of heterosexual sex, which would appeal to the prurient interest of the average person, with advertisements directed toward one or more deviant groups.

The fact that the mailings were aimed not only at that average person but also at specific deviant groups is further demonstrated by the inclusion in one mailing of a sheet of paper requesting that the recipient identify the particular types of materials—"novelties," "fetish," "gay," or "hetero"—that he was interested in receiving in the future. (See note 3, *supra,* p. 4.)

"Materials such as these, which by title or content may fairly be described as sado-masochistic" (*Ward* v. *Illinois,* 431 U.S. 767, 771), come under the *Mishkin* test. In *Ward,* the evidence consisted solely of the two publications—"Bizarre World" and "Illustrated Case Histories, a Study of Sado-Masochism"—and the testimony of the policeman who purchased them * * *". *Id.* at 770. Similarly, in this case the materials themselves established a sufficient evidentiary foundation for the instruction.

As the Court noted in another obscenity case, "the materials themselves * * * are the best evidence of

what they represent."[17] *Paris Adult Theatre I, supra,* 413 U.S. at 56. Obscenity "is not a subject that lends itself to the traditional use of expert testimony." *Id.* at 56 n. 6. Experts in this field traditionally differ.[18] Confronted with conflicting opinions, a jury will inevitably turn to the materials themselves.

Although the defense may have a right to attempt to persuade the jury that certain materials are not obscene by presenting experts (see *Smith* v. *California,* 361 U.S. 147, 164–165, 171 (Harlan, J., and Frankfurter, J., concurring)), the jury is not bound to accept the expert's opinion. This is both a realistic and sound approach: the jurors, who are members of the relevant community, have as good sense of the level of tolerance and acceptance of sexually-explicit materials in that community as any expert. See *United States* v. *Groner,* 479 F. 2d 577, 585 (C.A. 5) (*en banc*), certiorari denied, 419 U.S. 1010.

In any event, contrary to petitioner's assertion (Br. 41), the government did present additional evidence on this issue. Dr. James Rue (see *supra,* p. 9), an expert in marriage and family and child counselling,[19] testified as to various deviant sexual practices—group sex, homosexuality, sex with animals, artificial devices, sadomasochism and sadobondage—and concluded that these materials appealed "to the prurient interest of * * * deviant particular groups" (A. 33–37, 41; Tr. 571–578, 588–589). For example, Dr. Rue testified (A. 37; Tr. 577–578) that:

> group sex, which is so predominant in this material would again suggest that they are striving as best they know how to appeal to the unnatural, to the unwholesome side of sex, which would have particular interest, particularly to deviate groups, the homosexual one being obvious.

When asked to whom the film "Dirty Old Man" (which was advertised with a photograph of a teenage

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[17] See *United States* v. *Groner,* 479 F. 2d 577, 587 (C.A. 5) (*en banc*) (Ainsworth, J., concurring), vacated and remanded, 414 U.S. 969, on remand, 494 F. 2d 499, certiorari denied, 419 U.S. 1010: "Expert testimony to provide information to the fact finder may be helpful in obscenity cases but is not indispensable. At times it may confuse more than help. A swearing contest between opposing literary or social experts may well turn a case involving criminal sanctions pertaining to obscenity into a farce. This is not to say that such testimony may not be received by the trier of fact, but only that it should not be required. The juror, as the so-called reasonable man or average man, can determine as well as most experts whether the involved material is obscene within the definition of *Roth* and its progeny. It is no more difficult for the fact finder to make such a determination than it is to apply such elusive concepts as negligence and proximate cause or in the area of antitrust such broad phrases as 'restraint of trade' and 'every contract, combination * * * or conspiracy.'"

See *United States* v. *Palladino,* 490 F. 2d 499 (C.A. 1), where the court of appeals left to the district court the decision whether expert testimony should be required on prurient appeal to deviant groups.

[18] The present case well illustrates the truth of this assertion. Petitioner introduced two witnesses who testified that nothing, save perhaps necrophilia and sadomasochism, would appeal to prurient interest (Tr. 431–432, 501–502). On the other hand, the government's rebuttal witness, Dr. Rue, testified that the materials appealed to the prurient interest of the average person as well as to deviate sexual groups (A. 41; Tr. 588–589).

[19] Petitioner objected to Dr. Rue's testimony relating to the appeal of the materials to deviant sexual groups (A. 32; Tr. 552–553). But both Dr. Ward and Rev. McIlvenna, petitioner's

girl committing fellatio) appealed, Dr. Rue responded (A. 39–40; Tr. 580–581):

> I think to a deviate [sic] group that might be described as a sociopathic type of person, which we could call a character disorder.

Dr. Rue also testified that the picture of a female engaged in intercourse with a dog would appeal to the prurient interest of a sexually deviant group (A. 41; Tr. 582–583).

Dr. Rue's testimony constituted additional evidence that the materials in this case appealed to the prurient interest of "clearly defined deviant sexual group[s]." *Mishkin* v. *New York, supra,* 383 U.S. at 508.[20]

III. THE EVIDENCE JUSTIFIED THE INSTRUCTION ON PANDERING

The district court instructed the jury that (A. 59–60; Tr. 810–811):

> In making [the determination of obscenity under the *Roth-Memoirs* standard] you are not

experts, testified that the materials would not appeal to the prurient interest of homosexuals and other deviant sexual groups (Tr. 389–390, 500–504). Therefore, Dr. Rue's testimony was proper rebuttal.

[20] In addition, petitioner's expert witnesses gave evidence relevant to the question of deviant appeal. Reverend McIlvenna and Dr. Ward testified that sadomasochistic materials and necrophilia would appeal to a prurient interest in sex (Tr. 431–432). They also listed as deviant sexual groups zoophiliacs, necrophiliacs, sadomasochists, and homosexuals, but testified that these materials did not appeal to the prurient interest of those groups (Tr. 387–388, 499, 501–503). From McIlvenna's testimony, the jury could have concluded that parts of the brochures appealed to the prurient interest of sadomasochists. The jury could also have used petitioner's composite list of deviant groups in determining those to whom each photograph might appeal (G. Ex. 11C).

> limited to the materials themselves. In addition, you may consider the setting in which they are presented. Examples of what you may consider in this regard are such things as: manner of distribution, circumstances of production, sale and advertising. The editorial intent is also relevant. What you are determining here is whether the materials were produced and sold as stock in trade of the business of pandering. Pandering is the business of purveying textual or graphic matter openly advertised to appeal to erotic interest of the customer.
>
> The question of obscenity is to be answered by application of the basic test recited earlier, but if you find this to be a close case under that test, then you may consider the evidence of pandering to assist you in your decision. Such evidence is pertinent to all three elements of the basic test of obscenity.

Pandering is "the business of purveying textual or graphic matter openly advertised to appeal to the erotic interest of their customers." *Ginzburg* v. *United States,* 383 U.S. 463, 467; *Roth* v. *United States, supra,* 354 U.S. at 495–496 (Chief Justice Warren, concurring). "There is no doubt that as a matter of First Amendment obscenity law, evidence of pandering to prurient interests in the creation, promotion, or dissemination of material is relevant in determining whether the material is obscene." *Splawn* v. *California,* 431 U.S. 595, 598.[21] Contrary to petitioner's

[21] Petitioner's suggestion (Br. 46–47 n. 7) that *Ginzburg* was overruled by *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, was thus rejected in *Splawn* v. *California*, 431 U.S. 595.

contention (Br. 45–47), the evidence in the present case warranted an instruction on pandering.

The evidence showed, in essence, that petitioner was in the business of purveying books, magazines and films, such as the film "613" and the magazine "Bedplay," which he openly advertised to appeal to the particular "erotic interest" of his customers. For example, petitioner advertised film "613" in a four page brochure with a picture showing unnatural sex acts (G. Exs. 8A, 9B). No textual description of the film accompanied the photograph. This same brochure contained numerous advertisements for other films and magazines. Each advertisement contained one sexually explicit photograph and the title of the film or magazine. The four page brochure concluded with a clip out order form to be used in purchasing the advertised materials. In short, petitioner's "sole emphasis [was] on the sexually provocative aspects." *Memoirs* v. *Massachusetts,* 383 U.S. 413, 420; *Ginzburg* v. *United States, supra,* 383 U.S. at 470.

Similarly, the magazine "Bedplay" was advertised in a four page, black and white brochure devoted to advertising various sex films and magazines with photographs focusing on genitalia (G. Exs. 1B, 2A, 3A, 7B). The brochure contains a minimum of words, and those words that do appear were manifestly included "for titillation, not for saving intellectual content." [22]

[22] See, *e.g.*, the advertisement for the film "Mustachioed Magic" (G. Ex. 1B): "No Mr. America, but equal in stamina and stamen. His honey blond sex partner really stirs him up in the process and we are sure you will be too."

Ginzburg v. *United States, supra,* 383 U.S. at 470. This is graphically shown by the advertisement for the magazine "Bedplay," which contained on its cover only an erotic picture and no accompanying text.

The "leer of the sensualist" (*Ginzburg, supra,* 383 U.S. at 468) also permeates the remaining brochures, which depict a variety of pornographic scenes.

In sum, all of the advertised publications and films (each exorbitantly priced [23]) were "commercial exploitation of erotica * * *" and the brochures focused directly on their "prurient appeal." *Ginzburg* v. *United States, supra,* 383 U.S. at 466. Even a cursory examination of their content refutes petitioner's claim that there was a "paucity of evidence" on this issue (Br. 48). On the contrary, "Bedplay" and "613" were the "stock in trade" of petitioner's business of pandering. 383 U.S. at 467.

Moreover, as in *Ginzburg* v. *United States, supra,* 383 U.S. at 469–470, "[t]he solicitation was indiscriminate, not limited to those, such as physicians or psychiatrists, who might independently discern the book's therapeutic worth." The recipients in this case included a college student, a retired person, a housewife, a retail florist, an Episcopalian minister and a police lieutenant. At least one mailing was unsolicited. It contained a piece of paper informing the

[23] The price printed on "Bedplay" is $10.00 although the brochure advertised it for $7.50 (G. Exs. 1B, 7A). The film "613" was offered for $20.00 in black and white and $35.00 in color (G. Exs. 8A, 9B).

recipient that his name had been purchased from another mail order house and asked him to indicate which type of materials ("novelties, fetish, gay or hetero") he was interested in receiving (G. Ex. 11C). The recipients lived throughout the United States, and in each mailing petitioner included a return envelope with his business address. Petitioner stipulated that he "voluntarily and intentionally" mailed these brochures (A. 13–18; Tr. 134–141).

Petitioner's contention that this evidence was insufficient to support a pandering charge is based upon his mistaken belief that elaborate evidence of a defendant's editorial goals, practices, methods of operations and distribution is required. Such matters go to the weight and persuasiveness of the evidence, not to the threshold showing that justifies a pandering instruction. The materials here had no purpose other than to pander to a prurient interest, and petitioner—who concedes the "tawdry setting of this case (Br. 53)—makes no suggestion that the material could have had any other purpose.[24]

[24] Neither *Manual Enterprises* v. *Day*, 370 U.S. 478, 491, nor *Papish* v. *Board of Curators*, 410 U.S. 667, 670, n. 6, is to the contrary. Those cases did not involve advertising brochures containing hard core pornography and plainly offering more. Compare *United States* v. *Baranov*, 418 F. 2d 1051, 1053 (C.A. 9), and *Ginzburg* v. *United States*, *supra*, 383 U.S. at 465, in which it was assumed that apart from the context of the advertising, the materials were not obscene.

Equally inapplicable is *United States* v. *Pellegrino*, 467 F. 2d 41 (C.A. 9), which, as the court of appeals noted (Pet. App. 9a–10a), involved material containing "chaste and self-serving disclaimers of obscene theme which were not transparently spurious."

In any event, the district court's charge, which closely resembled the instruction approved in *Hamling* v. *United States*, *supra*, 418 U.S. at 130–131, left to the jury the determination whether the advertisement pandered to prurient interests and whether that fact showed that the materials were obscene. Contrary to petitioner's contention (Br. 50–52), the jury was invited to consider evidence that was well within the threshold for a pandering instruction, rather than matters not in evidence.

Because the brochures here "proclaimed its obscenity," *Ginzburg* v. *United States*, *supra*, 383 U.S. at 472, the two courts below correctly found (Tr. 738; Pet. App. 10a) that the instruction on pandering was justified. See *United States* v. *Dachsteiner*, 516 F. 2d 20, 22–23 (C.A. 9); *United States* v. *Wasserman*, 504 F. 2d 1012, 1016 (C.A. 5); *United States* v. *Ratner*, 502 F. 2d 1300, 1301–1302 n. 2 (C.A. 5), certiorari denied, 423 U.S. 898. In light of this evidence, the closing remarks of government counsel on this issue to the jury were not indiscriminate nor did they improperly open the "floodgates" (Br. 49). They simply underscored what the evidence showed (Tr. 731–734).

IV. THE DISTRICT COURT PROPERLY EXCLUDED TWO FILMS, "DEEP THROAT" AND "THE DEVIL IN MISS JONES," AS COMPARISON EVIDENCE

Petitioner contends (Br. 33, 38) that the district court erroneously excluded two films, "Deep Throat" and "The Devil in Miss Jones," as comparison evidence.[25]

In arguing that the materials in the present case are not obscene under community standards (A. 19–21; Tr. 170–172), petitioner contended that the financial success of two films, "Deep Throat" and "The Devil in Miss Jones," in Los Angeles (A. 21–27; Tr. 283–300) demonstrated that the relevant community tolerates the kind of material petitioner purveys. When the district court asked petitioner how these two films could compare to the still photographs in the printed materials and the film "613," none of which had a plot or any other characteristics of the

[25] The court of appeals held that the comparison evidence issue applied only to Count 9, which charged petitioner with mailing an obscene film, "613." Under the concurrent sentence doctrine, however, it declined to decide whether petitioner had shown a degree of community acceptance sufficient to warrant admission of the films as comparison evidence (Pet. App. 12a–14a). In our brief in opposition to the petition for a writ of certiorari, we urged (p. 10) that this ruling was correct. We erred. Petitioner was sentenced to concurrent terms of imprisonment on each of eleven counts and separate $500 fines on each count. The judgment shows that the fines are cumulative. Since petitioner has a monetary interest in reversing his conviction on any single count, the concurrent sentence doctrine is inapplicable here. *United States* v. *Allen*, 554 F. 2d 398, 407 n. 15 (C.A. 10), certiorari denied, No. 76–1851, October 3, 1977. Cf. *Jeffers* v. *United States*, No. 75–1805, decided June 16, 1977, slip op. 18–20. In the interest of judicial economy,

two films, petitioner replied that he intended to offer "the comparison only in terms of candor, not in comparison of theatrical beauty or excellence." The court replied, "I don't see that there is a basis for me to accept your offer as comparable evidence, or to allow this jury to view those pictures. And I will have to reject your proposal" (A. 20; Tr. 171–172).[26]

The court later viewed a portion of "Deep Throat," but again ruled that the jury should not view the films (A. 41–42; Tr. 693). Nevertheless, the court permitted petitioner to introduce evidence that, based on gross receipts, "Deep Throat" and "The Devil in Miss Jones" were respectively the first and third largest money making films in Los Angeles in 1973 (A. 21–27; Tr. 300–301). In addition, one of petitioner's expert witnesses, Dr. Ward, testified that "613" was equal in sexual explicitness to "Deep Throat" (Tr. 385–386).

The court of appeals viewed both films and compared them with all the other exhibits. It determined that "for the films to be admissible as comparable and probative of community standards the burden is on the defendant to demonstrate two prerequisites: (1) a reasonable resemblance between the proffered comparables and the allegedly obscene materials, and (2)

however, we submit that instead of remanding the case to the court of appeals for further consideration of the comparative evidence question, this Court should decide the issue.

[26] Petitioner offered to take the jury to a movie theatre to view the two films in their 35 mm. version with soundtrack as shown to the public. Alternatively, petitioner offered to exhibit 8 mm. silent, edited versions in the courtroom (A. 31; Tr. 539–542).

a reasonable degree of community acceptance of the proffered comparables" (Pet. App. 13a). Petitioner does not challenge this standard, which was first set forth in *United States* v. *Jacobs*, 433 F. 2d 932, 933 (C.A. 9); accord, *United States* v. *Womack*, 509 F. 2d 368, 377–378 (C.A. D.C.), certiorari denied, 422 U.S. 1022.

The court of appeals concluded that none of the advertising materials was comparable to the two films, because they (1) were of a different medium and (2) did not portray the homosexual and sadomasochistic materials advertised in the brochures. It ruled, however, that the two films "bore a reasonable resemblance to the film 'No. 613,'" involved in Count 9, because all three films presented the same or similar sexual acts with an equal degree of explicitness (Pet. App. 13a).

We submit that none of the materials met either element of the test for admissibility of comparable materials and that the district court did not abuse its broad discretion to determine "the illuminating relevance of testimony" in an obscenity trial in refusing to permit the jury to view the films. *Hamling* v. *United States, supra,* 418 U.S. at 124–125.

A. The advertising brochures on their face were substantially different in format and expression from the two comparison films. That all may have involved explicit depiction of sexual activity is not enough to establish comparability, for all depictions of "sex and obscenity are not synonymous" (*Roth* v. *United States,* 354 U.S. 476, 487).

Explicit depiction in one form and context is not necessarily the same in purpose and effect as such depiction in another. As the court of appeals noted (Pet. App. 13a), "'slight variations in format' may produce 'vastly different consequences in obscenity determinations.'" *United States* v. *Womack, supra,* 509 F. 2d at 378. The comparison films contain music, dialogue, purported humor, structured cinematic directions, and a plot. They were displayed to the public on 35 mm. color film in a motion picture theatre and were intended as entertainment. In contrast, petitioner's brochures presented black and white photographs with no story development or text. "Bedplay" magazine similarly was nothing more than a collection of hard-core pornographic pictures.

Save for explicit sexual description, the two films also lacked a reasonable resemblance to petitioner's film "613." The latter was a black and white 8 mm. film of poor quality with no soundtrack, dialogue, subtitles, or plot, edited to emphasize only sexual episodes.

B. In any event, petitioner's evidence did not show significant community acceptance of the two films and thus did not satisfy the second element of the test for comparison evidence in obscenity cases. Success at the box office is not necessarily a measure of community acceptance. Box office receipts indicate only the number of people who, out of curiosity or otherwise, attended the showing of a film; they do not indicate the reactions of the movie-

goers as they departed the theatre. Nor does it follow that because "Deep Throat" attracted a large audience in Los Angeles, the average person in the community would not find the film obscene.[27] As the Court noted in *Hamling* v. *United States, supra,* 418 U.S. at 126, quoting from *United States* v. *Manarite, supra,* 448 F. 2d at 583:

> Mere availability of similar material by itself means nothing more than that other persons are engaged in similar activities.

Moreover, petitioner's sampling of the Central District of California (where this case was tried) was incomplete: it did not account for the views of the large number of adults in the seven counties of the district[28] who did not attend the film or for the likelihood that many ticket-buyers were tourists, conventioneers, or repeat viewers from outside the district. Petitioner showed only that these films were financially successful in Los Angeles.

In addition, the substantial receipts the two films generated may indicate only a lack of effective prosecution or a decision to employ enforcement re-

[27] The First Circuit in *United States* v. *One Reel of Film*, 481 F. 2d 206, 208, described "Deep Throat" as containing "scenes of explicit heterosexual intercourse, including group sex, and emphasiz[ing] various scenes of explicit penetration, fellatio, cunnilingus, female masturbation, anal sodomy and seminal ejaculation."

[28] The Central District of California contains seven counties: San Luis Obispo, Ventura, Santa Barbara, San Bernardino, Riverside, Los Angeles and Orange (A. 58; Tr. 808). In 1970, these counties had a combined population of 6,374,471 persons over 21. Bureau of the Census, 1970 Census of Population, Charcteristics of Population for California.

sources elsewhere, not community acceptance of their explicit sexual material. Cf. *Smith* v. *United States, supra,* 431 U.S. at 306. Even "[a] judicial determination that particular matters are not obscene does not necessarily make them relevant to the determination of the obscenity of other materials, much less mandate their admission into evidence." *Hamling* v. *United States, supra,* 418 U.S. at 126–127.

"Deep Throat" has been found to be obscene in prosecutions in other parts of the country.[29] Such determinations, of course, are not dispositive in the Central District of California, any more than the opposite determination would be. But they indicate that the introduction of such materials may invite

[29] *United States* v. *Marks*, 520 F. 2d 913 (C.A. 6) (under *Miller*), reversed, *Marks* v. *United States*, 430 U.S. 188 (improper standard applied), convicted on retrial, E.D. Ky., No. 11,057, September 9, 1977, (under *Memoirs*), appeal pending, C.A. 6, No. 77–5382; *United States* v. *One Reel of Film*, 481 F. 2d 206, 208–209 (C.A. 1), affirming 360 F. Supp. 1067 (D. Mass.) (film obscene under *Miller* and *Memoirs*); *Sanders* v. *State*, 234 Ga. 586, 216 S.E. 2d 838 (film obscene, no standard enunciated); *People* v. *Mature Enterprises, Inc.*, 352 N.Y.S. 2d 346, 76 Misc. 2d 660 (film obscene under *Miller*); *Mangum* v. *Maryland State Board of Censors*, 273 Md. 176, 328 A. 2d 283 (film obscene under *Miller*, probably obscene under *Memoirs*); *State* v. *American Theater Corp.*, 194 Neb. 84, 230 N.W. 2d 209 (film obscene under *Miller* and *Memoirs*); *State ex rel Cahalan* v. *Diversified Theatrical Corp.*, 59 Mich. App. 223, 229 N.W. 2d 389 (film obscene under *Miller*).

Prosecutions for the showing of "Deep Throat" resulted in acquittals in Los Angeles County, Orange County and San Bernardino County. In obscenity cases "different juries might reach different conclusions as to the same material." *Smith* v. *United States, supra,* 431 U.S. at 309; *Hamling* v. *United States, supra,* 418 U.S. at 101; *Miller* v. *California, supra,* 413 U.S. at 26, n. 9; *Roth* v. *United States, supra,* 354 U.S. at 492, n. 30. Cf. *Dunlop* v. *United States*, 165 U.S. 486, 499–500.

the jury to speculate on the obscenity *vel non* of the comparison films themselves and may thus "tend to create more confusion than enlightenment * * *" (*Hamling* v. *United States, supra,* 418 U.S. at 127) and "make the trial unmanageably complex and lengthy." *United States* v. *Womack, supra,* 509 F. 2d at 378.

The district court has broad discretion in determining the admissibility of comparison evidence in obscenity cases. The court did not here abuse its discretion in concluding that requiring the jury to view and consider the two films, solely because they contained similar scenes of explicit sex and had enjoyed commercial success, would not have advanced the jury's deliberations.

The court did not, however, by excluding the films, preclude petitioner from introducing appropriate evidence relevant to community standards. See *Smith* v. *California, supra,* 361 U.S. at 164 (Frankfurter, J., concurring). Petitioner presented five witnesses who testified concerning community standards. Two of those witnesses, Gayle Essary and Roderick Bell, gave the results of a survey they had taken in certain areas of the Central District of California on community acceptance of explicit sexual conduct in movies. Dr. Ward and Reverend McIlvenna testified that the materials at issue would not appeal to the prurient interest of the average person in the community. Petitioner's difficulty is that the jury rejected this evidence, as it had the right to do.[20]

[20] If the Court agrees with our contention that the two comparison films were properly excluded with respect to the obscenity

In sum, this is not an easy case. As the court of appeals observed, and as we agree, certain aspects of the district court's instructions were unnecessary and it would have been the better practice not to have included them. Nevertheless, in light of the unmistakable nature of the materials, which plainly are outside the protections of the First Amendment, the manner in which they were purveyed, and the instructions when viewed as a whole, the court of appeals correctly concluded that the trial judge's charge to the jury did not constitute reversible error.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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of petitioner's advertising materials, then the comparison issue will have been resolved with respect to all counts of the indictment save Count 8, which charged petitioner with mailing "an advertisement giving information where, how, from whom, and by what means an obscene film described as No. '613' could be obtained" (A. 6). Count 9, which charged petitioner with mailing an "obscene movie film identified as No. '613' and obscene illustrated brochures advertising sex films, books and magazines" (A. 7) should not be reversed, because one of the obscene brochures, "Canned Heat" (G. Ex. 9E), was also determined to be obscene by the jury in Counts 4, 5, and 6 (see G. Exs. 4A, 5A, and 6A).

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